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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1321 OF 2006

1. Tanaji Baburao Raut
Age 19, Occ. Business
R/o Ganga Talkies, TATA Road,
Panvel, District – Raigad.
2. Gorakh Raosaheb Jadhav
Age 26, Occ. Driver,
R/o A/23/8, CIDCO Colony,
Sector, 13, New Panvel

.. Appellants
(Org.Accd.Nos.2 &3)

Vs.

The State of Maharashtra

.. Respondent

WITH
CRIMINAL APPEAL NO. 141 OF 2007

Datta Arun Gaikwad
Age 22 yrs., Occ. Security Guard
R/o Gangaram Talkies Near Old
Panvel, Conark Building, Room
No.47, 4th Floor, Panvel

.. Appellant
(Org.Accd.No.4)

Vs.

The State of Maharashtra

.. Respondent

WITH
CRIMINAL APPEAL NO. 213 OF 2007

Sani Suhas Shinde
Age 19 yrs., Occ: Nil
R/o Shram Jeevi Nagar,
Eastern High Way, Near Room No.199,
Chembur, Mumbai.

.. Appellant
(Org. Accd.No.1)

Vs.

The State of Maharashtra

.. Respondent

Dr. Yug Mohit Chaudhary for appellants in Cri. Appeal No.1321 of 2006 and Cri. Appeal No.213 of 2007.

Mr. R. V. Bansode for appellant in Cri. Appeal No. 141 of 2007.

Mr. H. J. Dedhia, APP for State in all the matters.

CORAM: P. V. HARDAS &
DR. SHALINI PHANSALKAR-JOSHI, JJ.

MAY 07, 2015.

ORAL JUDGMENT [Per P. V. Hardas, J.] :

1. The appellants/Original Accused Nos.1 to 4, who stand convicted for offence punishable under Sections 364 r/w 120-B, 365 r/w 120-B, 342 r/w 120-B, 201 r/w 120-B, 396 and 302 r/w 120-B of the Indian Penal Code and sentenced to RI for 10 years and each accused to pay fine of Rs.1000/-, in default of which to undergo RI for one month, RI for 2 years and each accused to pay fine of Rs.1000/-, in default of which to undergo SI for one month, SI for one year and each accused to pay fine of Rs.1000/-, in default of which to undergo SI for one month, SI for one year and each accused to pay fine of Rs.1000/-, in default of which to undergo

RI for one month and imprisonment for life and each accused to pay fine of Rs.1000/-, in default of which to undergo RI for one month, by the 12th Ad-hoc Additional Sessions Judge for Greater Bombay at Sewree, by judgment dated 30/10/2006, in Sessions Case No. 410 of 2004, by these appeals challenge their conviction and sentence.

2. Facts, as are necessary for the decision of these appeals, may briefly be stated thus :-

PW 1 – ASI Laxman Awale, who, on 28/2/2004, was attached to Vikroli Police Station and was on night duty from 8 p.m. to 8 a.m. of 29/2/2004, was standing near the Godrej bridge. At about 10.30 p.m., one unknown motorcyclist informed PW 1 – ASI Awale about the suspicious manner in which one Sumo vehicle was parked. On receiving the information, PW 1 – ASI Awale, along with police staff, visited the scene of the incident i.e. at Ghoda Gate. They noticed one parked Sumo vehicle, facing towards Thane. The bonnet of the vehicle was opened. The turning indicator was on. The Registration number of that vehicle was Mh-04-2-9879. PW 1 – ASI Awale flashed a torch and in the torch light, noticed blood seeping from the vehicle. They opened the door of the driver side

and found one chopper and sword which were blood stained. On opening the rear door of the Sumo, they noticed one person lying in the middle seat of the Tata Sumo vehicle with his hands and legs bound by a wire. Vikroli mobile van no.1 was immediately called for and information was conveyed to the Vikroli Police Station. They noticed the injured to have sustained injuries due to some sharp cutting weapon on his chest, head and stomach. On arrival of the mobile van, the injured was placed on a stretcher and taken to the Sion Hospital. Though the injured was alive, he was not in a condition to speak. On the basis of the visiting card in the pocket of his shirt, PW 1 – ASI Awale learnt the name of the injured as Babulalji Mitalalji Chaplot Jain. Injured was admitted in the Sion Hospital, but succumbed to his injuries at 1.15 a.m. The Duty Officer and the police station were informed about the death of the injured. PW 1 – ASI Awale had not accompanied the injured to the hospital and was waiting at the scene of the incident. At the scene of the incident, they noticed one blood stained shirt lying at a distance of about 4 to 5 ft. from the Tata Sumo Vehicle. Sample of ordinary mud and blood mixed mud was drawn from the scene of the incident. PW 1 – ASI Awale accordingly lodged his report at Exh. 36.

PW 10 – Police Constable Milind Pal, who was also attached to Vikroli Police Station and was on duty along with PW 1 – ASI Awale, took the injured to the Sion Hospital and admitted him in the I.C.U. After the injured was admitted in the I.C.U., he was operated upon and after about an hour, he succumbed to his injuries. PW 10 – Police Constable Pal accordingly informed the Duty Officer and the Vikroli Police Station.

PW 12 – PSI Madhukar Vade, who was attached to Vikroli Police Station, accompanied PW 14 – PI Nadaf to the scene of the incident. PW 12 – PSI Vade recorded the report of PW 1 – ASI Awale at Exh. 36. On the basis of the report of PW 1 – ASI Awale, he registered an offence vide Crime No. 36 of 2004 under Sections 302 and 342 of the IPC and under Section 4/25 of the Indian Arms Act and under Section 135 of the Bombay Police Act. The printed F.I.R. Is at Exh. 93. The offence had been registered against unknown persons. PW 12 – PSI Vade then visited the scene of the incident and in the presence of panchas, drew the scene of the incident panchanama at Exh. 49. From the scene of the incident, he seized one cream coloured trouser, shirt of green colour, which was blood stained, one orange coloured full shirt, one ash coloured handkerchief etc. He thereafter visited the Sion Hospital and drew the inquest panchanama of

the dead body of deceased Babulal at Exh. 81. The dead body was referred for postmortem examination and after conducting the postmortem examination, he seized the clothes of the deceased in the presence of panchas under seizure memo at Exh. 50. The investigation was thereafter handed over to PW 14 – PI Nadaf.

PW 14 – PI Nadaf, who was also attached to Vikroli Police Station, received information from the Control Room at 10.30 p.m. regarding some mishap at Ghoda Gate in front of Godrej Company. He accordingly proceeded to the scene of the incident along with the police staff. The mobile van no.1 was summoned and the injured, who was found in the Tata Sumo vehicle, was sent to the Sion Hospital. In the presence of PW 14 – PI Nadaf, report of PW 1 – ASI Awale was recorded and an offence was registered on the basis of the report of PW 1 – ASI Awale. On the next day, PW 14 – PI Nadaf went to the Jewellery shop i.e. Vandana Jewellers and took search of the shop, but nothing incriminating was found. Statements of witnesses were recorded and search for the accused was undertaken, but the accused were not traceable. On 2/3/2004 statement of proprietor of Taj Tailor, namely, PW 11 – Manjoor Alam was recorded. The bill book of Taj Tailor was accordingly seized. From

3/3/2004 to 10/3/2004, the police searched for accused Tanaji. Statement of father of deceased was recorded. On 4/3/2004 statement of the tempo driver was recorded. Statement of PW 8 – Kamladevi, wife of deceased, was also recorded. On 10/3/2004 at about 6.40 p.m. information was received from PW 11 – Manjoor Alam about presence of accused Tanaji near the sugarcane juice centre, near Gangaram Talkies, Panvel. On reaching the said place, PW 11 – Manjoor Alam pointed out accused Tanaji and accordingly, the accused Tanaji and accused Gorakh were arrested. During the interrogation, the names of other accused were revealed. Accused Sani and accused Umesh were arrested under arrest panchanama at Exh. 51.

During custodial interrogation, on 12/3/2004 accused – Sani expressed his willingness to point out the place where his clothes and gold ring had been concealed. A memorandum was accordingly recorded in the presence of panchas at Exh. 65. The accused led the police and the panchas to his house and on entering the house, produced his clothes, which were seized under seizure panchanama at Exh. 66. The accused then led the police and the panchas to the shop of one Babu Jewellers at Chembur Naka. PW 9 – Mangilal Jain, the owner of the shop, produced a ring

weighing 5.8 gms. It was also seized under the said panchanama.

On the same day, during custodial interrogation, accused no.3 – Gorakh expressed his willingness to point out the place from where the Sumo vehicle was stolen. The memorandum was accordingly drawn at Exh. 67. The accused led the police and the panchas and pointed out the place and a detailed panchanama was accordingly drawn at Exh. 75.

We may at this juncture point out that there is no evidence as to when and the place from where the said Tata Sumo vehicle had been stolen. This panchanama, which does not lead to any discovery, in our opinion, therefore, would be wholly inadmissible in evidence.

Accused – Datta was arrested from Solapur. During custodial interrogation, on 14/3/2004, accused – Datta expressed his willingness to point out the place where his clothes had been concealed. Accordingly, a memorandum was drawn at Exh. 69. Accused – Datta led the police and the panchas to Konar Building at Panvel and from the 4th floor, produced his clothes, which were seized under seizure memo at Exh. 70. On the same day, accused – Ritesh was also arrested. A panchanama of the confessional

statement of the accused in respect of the commission of the crime is recorded at Exh. 78 which is styled as a panchanama. The aforesaid panchanama would be wholly inadmissible in evidence.

On 21/3/2004, accused – Tanaji expressed his willingness to point out the place where his clothes had been concealed. A memorandum was accordingly drawn in the presence of panchas at Exh. 56. On 23/3/2004 accused Sani expressed his willingness to point out the place where the clothes had been burnt. A memorandum was accordingly recorded and the accused led the police and the panchas to Shramajivi Nagar near Highway at Chembur and pointed out the place. From that place, pieces of burnt clothes mixed with sand were seized and a panchanama was accordingly drawn. The memorandum and the panchanama are at Exhs. 58 and 59.

On 27/3/2004 accused – Ritesh expressed his willingness to point out the place where his ration card had been concealed on the basis of which he had purchased kerosene. A memorandum was accordingly drawn at Exh. 60. Accused Ritesh accordingly led the police and the panchas to his house and produced one ration card, which was seized under seizure

memo at Exh. 61. The seized articles were referred to the C.A. under requisition at Exh. 101. Further to the completion of investigation, a charge-sheet against the accused was filed.

Postmortem on the dead body of deceased Babulal was performed by PW 13 – Dr. Ragvendra Vishwakarma. PW 13 – Dr. Vishwakarma noticed the following external injuries:-

- (i) Contusion left temple 8 x 4 cm.
- (ii) Contusion above left brow 3 x 0.8 cm.
- (iii) Multiple contusion near left angle of mouth 0.5 x 1.5 cm.
- (iv) Contusion below right eye 3 x 2 cm.
- (v) Contusion on bridge of nose 0.8 cm x 0.7 cm.
- (vi) Incised wound below right ear extending onto the neck 7.5 x 2 cm inside muscle deep.
- (vii) Incised wound across the fingers (dorsal aspects) right hand extending from the base of right fourth metacarpus to middle phalanx of right index finger with under line bone fracture.

- (viii) Stab wound left 7th intercostal 3 cm x 0.5 cm with medial edge contused.
- (ix) Linear contusion 4.9 x 0.8 cm below left nipple.
- (x) Left fourth intercostal drain wound 3.8 cm. with four sutures.
- (xi) Incised wound over right hand (Palmar aspect) across the fourth and fifth finger at the middle inter phalangeal joint.
- (xii) Comminuted fracture skull bilateral parietal frontal and temporal bones.
- (xiii) Fracture middle phalanx right index finger. Fracture left 7th 8th 9th ribs.
- (xiv) Multiple incised wounds of varying size and location were seen:- (1) 9.5 cm. x 1 cm., (2) 7.5 cm. x 0.6 cm., (3) 4.5 cm x 0.8 cm., (4) 3.5 cm. x 0.6 cm., (5) 7.5 cm. x 0.6 cm., (6) 5 cm x 0.8 cm., (7) 5.5 cm. x 0.8 cm., (8) 6.8 cm. x 0.6 cm., (9) 7 cm x 0.8 cm., (10) 7.5 cm. x 0.6 cm., (11) 4 cm. x 0.6 cm., (12) 5 cm. x 0.6 cm., (13) 9 cm. x 1 cm., (14) 3.8 cm. x 0.8 cm., (15) 6.8 cm x 0.8 cm. and (16) Split laceration 5.5 x 1 cm.

On internal examination, he noticed the following injuries:-

- (i) Extradural hematoma right parietal 5 x 4.5 x 4 cm.
- (ii) Massive subarachnoid hemorrhage diffuse.
- (iii) On cut surface brain parenchyma multiple intercerebral hemorrhages 0.5 to 1 cm. across the parietal and temporal lobes.

The left lung showed multiple intraparenchymal hemorrhage in upper and middle lobes.

According to him, the cause of death was craniocerebral injuries due to multiple heavy impacts in a case of assault. The postmortem report is at Exh. 97, while the cause of death certificate is at Exh. 96.

3. On committal of the case to Court of Sessions, Trial Court vide Exh. 2 framed charge against the accused for offence punishable under Sections 120-B r/w 302, 396, 364, 365, under Sections 364, 365 r/w 120-B and in the alternative 364, 365 r/w 34, 342 r/w 120-B or in the alternative

342 r/w 34, 396, 302 r/w 120-B or in the alternative 302 r/w 34, 201 r/w 120-B or in the alternative 201 r/w 34 of the IPC and under Section 25(1) B r/w 4 of Arms Act and 216-A, 212 and 201 r/w 120-B or in the alternative 216-A, 212 and 201 r/w 34 of the IPC. The accused denied their guilt and claimed to be tried. Prosecution, in support of its case, examined 14 witnesses. The defence of the accused was of denial. The trial court, upon appreciation of the evidence, convicted and sentenced the appellant as afore-stated. These appeals, which have been filed by the appellants are being decided by this common judgment.

4. We have heard Dr. Yug Mohit Chaudhary and Mr. R. V. Bansode, learned counsel for the appellants and the learned APP and in order to effectively deal with the submissions advanced before us by the learned counsel for the parties, it would be useful to refer to the evidence of the prosecution witnesses.

5. Prosecution has examined PW 7 – Hitesh, son of deceased Babulal. PW 7 – Hitesh deposes that deceased Babulal was running a jewellery shop in the name of Vandana Jewellers situated at Shanta Jog Marg, Tilak Nagar, Chembur. Deceased Babulal used to open his shop at 9 a.m. and used to close his shop at 9 p.m. According to him, on 28/2/2004

deceased Babulal had left the house at about 9 a.m. and PW 7 – Hitesh left the house at around 2 p.m. PW 7 – Hitesh returned home at about 10.15 p.m. and learnt that his father deceased Babulal had not arrived home. PW 8 – Kamladevi, mother of PW 7 – Hitesh and wife of deceased Babulal was worried as deceased Babulal had not returned home at the usual time. PW 7 – Hitesh, therefore, telephoned the Vandana Jewellers, but no one answered the telephone. PW 8 – Kamladevi, therefore, left the house for going in search of deceased Babulal. After taking snacks, PW 7 – Hitesh also left the house in search of Babulal. Meanwhile, PW 8 – Kamladevi returned home and informed Hitesh that the shop was closed. Within a short time thereafter, one police officer of the Tilak Nagar Police Station arrived at the house at about 10.45 p.m. and informed Hitesh that deceased Babulal had met with an accident and was admitted in the Sion Hospital. On receipt of the information, PW 7 – Hitesh went to the Sion Hospital, accompanied by his neighbours. On reaching the hospital, he noticed his father having sustained several injuries. Deceased Babulal ultimately succumbed to his injuries at about 12.15 a.m. on 29/2/2004.

In cross-examination, he has admitted that deceased Babulal was a licensed money lender, but was not discussing the money lending

transactions with PW 7 – Hitesh.

6. Prosecution has examined PW 8 – Kamladevi, wife of deceased Babulal, who deposes that deceased Babulal used to leave the house at about 9 a.m. and used to return home after closing his shop at 9.15 p.m. According to her, on the day of the incident, she had gone to the shop of deceased Babulal at about 12.15 p.m. for giving lunch to deceased Babulal. Since deceased Babulal did not return home till 9.15 p.m., Kamladevi was worried. PW 7 – Hitesh returned home at about 10.15 p.m. and, therefore, Kamladevi informed him that deceased Babulal had not returned home. Since Hitesh was hungry, he was served with his dinner and Kamladevi left the house for going to the shop. On reaching the shop, she noticed that the shop was locked. The neighbours had informed her that deceased Babulal had left the shop before 9 p.m. While she was returning, she met PW 7 – Hitesh and, therefore, returned home with him. Immediately, the police had arrived at house and had informed her that Babulal had met with an accident. He has identified the topaz ring which was worn by deceased Babulal. The said ring is Article Z/2 and the clothes of deceased Babulal are Articles Z/12 and Z/13. She has also identified the wrist watch Article Z/14 and the diaries at Z/15.

7. In the present case, though the prosecution has examined about 14 witnesses, the prosecution has utterly failed to establish any motive for the appellants to have committed the crime. The prosecution has not been able to place on record any evidence that the appellants bore some grudge against the deceased or that the deceased Babulal had advanced any money to the appellants. In our opinion, this is a major flaw in the prosecution case as the case against the appellants is based on circumstantial evidence. In cases based on circumstantial evidence, motive as a circumstance assumes importance and is one of the important circumstances. It is true that failure to establish motive by itself would not be fatal to the prosecution case and the conviction of the accused can still be recorded in the absence of any evidence of motive, if the other evidence or the other circumstances unerringly establish the guilt of the accused. In the present case, the prosecution has utterly failed in establishing and proving any motive for the appellants to have committed the crime.

8. The circumstance against the accused is the finding of a shirt near the scene of the offence. The prosecution has alleged that the said shirt belonged to accused no.2 – Tanaji. Prosecution has accordingly examined PW 11 – Manjoor Alam , a Tailor, who had stitched the shirt.

PW 11 – Manjoor Alam deposes that he along with his nephew Aslam was running a tailoring shop known as “Taj Tailors”. According to him, an orange coloured shirt was brought by the police and shown to him on 2/3/2004. The shirt was stained with blood and the shirt bore label of Taj Tailors, Panvel. He accordingly checked the bill-book of the shop and noted that the said shirt had been given for stitching by one Tanajirao. The said customer had placed an order for stitching one trouser and two shirts. He has produced the copy of the bill-book at Exh. 90. He has identified accused to be the same person for whom he had stitched the shirt. According to him, the delivery had been effected to the accused on 17/5/2003. He further deposes that about 10 to 12 days of the police coming to his shop, he had gone to see a movie at the Gangaram Theater at Panvel. When he had come out of the movie hall for drinking sugarcane juice, he had noticed accused – Tanaji and accordingly had informed the Vikroli Police Station. The police arrived there and had arrested the accused.

In cross-examination, he has admitted that when the shirt was shown to him, there were dried blood stains on the shirt. He has also admitted that the shirt was not wrapped, but was being carried in a bag. He

has admitted that he had stitched two identical shirts from the same fabric. He then admits in the cross-examination that about 8 to 10 days prior to the arrival of the police, accused – Tanaji had taken delivery of the shirt. He has admitted that he had seen the accused when he had placed order for stitching shirt and second time when the delivery was effected and the third occasion when he had seen the accused at the Theater.

9. In respect of this circumstance, learned counsel for the appellants have rightly urged before us that mere presence of the shirt near about the scene of the incident, even admitting that the shirt belonged to accused – Tanaji, would not involve the accused in the commission of the offence. There is no evidence on record which would indicate that on the day of the incident and at near about the scene of the incident, the accused was seen wearing the shirt. As per the evidence of PW 11 – Manjoor Alam, the accused had taken delivery of the shirt on 17/5/2003 i.e. about 9 months prior to the incident. There is no evidence as to from how many days the said shirt was lying at the scene of the incident. The blood stains found on the shirt had also not been identified to be belonging to the blood group of the deceased. There is absolutely no evidence that the shirt was sealed and in fact, there is evidence that the shirt had not been sealed prior to it being

sent to the C.A. Thus, in our opinion, mere finding of the shirt near the scene of the incident, minus the other linked evidence, would not establish the involvement of accused – Tanaji in the commission of the offence. The said circumstance, in our opinion, is not an incriminating circumstance which can be used as one of the links for forging the chain of circumstantial evidence.

10. Prosecution has then relied upon the recovery of the topaz ring which belonged to deceased Babulal. The prosecution has examined PW 9 – Mangilal Jain, a money lender. PW 9 – Mangilal Jain deposes that he was running a shop by name Babu Jewellers at Chembur Naka. According to him on 29/2/2004 at about 5 p.m. one Salim had come to his shop for hypothecating a topaz gold ring. Said Salim had informed PW 9 – Mangilal Jain that his brother-in-law was ill and, therefore, Salim was in need of money. According to Mangilal Jain, he was acquainted with the mother of Salim and, therefore, he had paid Rs.1000/-. After 3 to 4 days, Salim had again come to his shop and had informed him that his brother-in-law was ill and was in need of money and, therefore, was willing to sell the gold ring which had been pledged by him. Mangilal Jain accordingly had given Rs.832/- to Salim and had produced the gold ring. On 12/3/2004 at

about 1.30 p.m. Vikroli Police had brought accused Sani to his shop. This witness is adverted to what was stated by accused – Sani to the police. The aforesaid statement of accused – Sani made in the presence of the police, while he was in the custody and which was inculpatory, would be wholly inadmissible in evidence. According to Mangilal Jain, however, he had produced the gold ring sticking stone of Jen-topaz and it was seized by the police. In cross-examination, an omission is elicited that Mangilal Jain had not stated in his evidence that accused – Sani had informed the police that he was standing at some distance when the ring had been pledged by Salim. Since the said statement of accused – Sani is inadmissible in evidence, in our opinion, it is immaterial if this statement has been elicited by way of omission.

11. In respect of this circumstance, learned counsel for the appellants have rightly urged before us that admittedly according to Mangilal Jain, the said ring had been produced by one Salim. No nexus has been established with the pledging of the ring with accused – Sani. In our opinion, this circumstance cannot be said to be a circumstance which would implicate accused – Sani in the commission of the crime. Said gold ring had not been pledged by accused – Sani with PW 9 – Mangilal Jain.

Said ring had been pledged by one Salim who had not been examined by the prosecution. No nexus has been established between the accused and said Salim. In the absence thereof, the recovery of the ring from PW 9 – Mangilal Jain is of no consequence and would not advance the prosecution case further.

12. The clothes of the accused appear to have been seized. The learned counsel for the appellants have referred to the evidence of the panch witnesses relating to the discovery memorandum of the accused relating to seizure of their clothes. The report of the C.A. does not unerringly indicate that the clothes of the accused were found with blood matching the blood group of the deceased. Moreover, there is no evidence that the accused were seen wearing these clothes. In the absence of such evidence, the recovery of the clothes at the behest of the accused, in our opinion, can hardly be said to be a circumstance for founding the conviction of the accused.

13. Thus having examined and appreciating the prosecution evidence, in our opinion, the prosecution has utterly failed to prove the offence against the appellants beyond reasonable doubt. The prosecution has utterly failed to establish motive for the accused to have committed the

crime. No stolen articles have been recovered from the possession of the accused. There is no evidence which would link the accused with the commission of the crime. There is no evidence to indicate that the Tata Sumo vehicle had been stolen by the accused or that the accused had driven the said vehicle. In the absence of any evidence which would implicate the present appellants in the commission of the crime, in our opinion, the appellants are entitled to be given the benefit of doubt.

14. Accordingly, Criminal Appeal Nos. 1321 of 2006, 141 of 2007 and 213 of 2007 are allowed and the conviction and sentence of the appellants/Original Accused Nos.1 to 4 is hereby quashed and set aside and they are acquitted of the offence with which they were charged and convicted. Fine, if paid by the appellants, be refunded to them. Since Original Accused No. 2 – Tanaji Baburao Raut, Original Accused No. 4 – Datta Arun Gaikwad and Original Accused No.1 – Sani Suhas Shinde are in jail, they be released forthwith, if not required in any other case. Bail bonds of Original Accused No. 3 – Gorakh Raosaheb Jadhav stand cancelled.

(DR. SHALINI PHANSALKAR-JOSHI,J.)

(P. V. HARDAS,J.)